

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:98CR3007
)	
Plaintiff,)	
)	
v.)	MEMORANDUM
)	AND ORDER
JOSE C. TAPIA,)	
)	
Defendant.)	

In 2001, the defendant filed a motion under 28 U.S.C. § 2255 (filing 221), which was denied by this court (filing 237). Both this court (filing 245) and the Eighth Circuit Court of Appeals (filing 253, on May 6, 2002) denied a certificate of appealability. On April 11, 2005, the defendant filed a “Motion to Recall the Mandate, and for Reconsideration in Light of Booker” (filing 260). That motion was summarily denied (filing 260).

The defendant has now filed a notice of appeal of the denial of his “Motion to Recall the Mandate.” (Filing 261.) I find that the appeal is not taken in good faith, for two reasons. First, United States v. Booker, 125 S. Ct. 738 (2005) does not apply retroactively to cases on collateral review. A sister district court in the Eighth Circuit has so held. Tineo v. Le Blanc, No. Civ. 05-318 ADMSRN, 2005 WL 740520, at *2 (D. Minn. Mar. 31, 2005). Though the Eighth Circuit has not yet ruled on this issue, the other circuit courts that have ruled are in accord. See, e.g., Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005). Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005). Second, to the extent the motion being appealed is properly construed as a 28 U.S.C. § 2255 motion, this is a successive petition and may not be brought unless certified by a panel of the court of appeals. 28 U.S.C. § 2255.

Pursuant to Fed. R. App. P. 24(a)(3), and for the foregoing reasons, I certify that the appeal is not taken in good faith and the defendant is not entitled to proceed on appeal in forma pauperis.

Accordingly,

IT IS ORDERED:

1. The appeal is not taken in good faith and the defendant is not entitled to proceed on appeal in forma pauperis; and
2. The Clerk of the Court shall forward a copy of this order with the Notice of Appeal.

April 28, 2005.

BY THE COURT:

s/Richard G. Kopf
United States District Judge